SERVED: March 29, 1994

NTSB Order No. EA-4120

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of March, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. KENNETH H. BERNSTEIN, Respondent.	Docket SE-12051

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge Joyce Capps at the conclusion of an evidentiary hearing held in this case on March 13, 1992.[1] In that order, the law judge affirmed an order suspending respondent's private pilot certificate for 120 days based on his operation of an allegedly unairworthy aircraft on three separate

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

flights. For the reasons stated below, we deny respondent's appeal and affirm the law judge's initial decision.

The Administrator's order/complaint alleged the following facts, which the law judge found established:

> 2. On June 16, 1990, you were pilot-in-command of civil aircraft N43108, a Piper PA32300 on a passenger-carrying flight from Martha's Vineyard, Massachusetts, to New Bedford, Massachusetts, and on a return flight from New Bedford, Massachusetts, to Martha's Vineyard, Massachusetts.
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> 3. On June 17, 1990, you were pilot-in-command of civil aircraft N43108, on a passenger-carrying flight from Martha's Vineyard, Massachusetts to Baltimore, Maryland.
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> 4. Civil aircraft N43108 is a powered aircraft with a standard category U.S. airworthiness certificate and therefore, must contain an operative tachometer on board.
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> 5. Prior to said flights, you were aware that the tachometer on civil aircraft N43108 was inoperative, and that, as a result, a condition notice was issued and attached to civil aircraft N43108.
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> 6. Said condition rendered civil aircraft N43108 unairworthy.
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> 7. Nevertheless, you operated civil aircraft N43108 during these three separate flights, as described in paragraphs 2 and 3 above, when the tachometer was inoperative.
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> 8. Your operation of said aircraft was [sic] in the matter and under the circumstances described above was careless and/or reckless so as to endanger the life or property of another.

It was alleged that respondent's operation of his aircraft, as described above, was in violation of 14 C.F.R. 91.29(a),

91.33(a), and 91.9.[2]

Respondent admits that he operated his aircraft on the three flights described in the complaint,[3] and that he knew before

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[2] Section 91.29(a) [now recodified as 91.7(a)] provided:

§ 91.29 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

Section 91.33(a) [now recodified as § 91.205(a)] provided:

§ 91.33 Powered civil aircraft with standard category U.S. airworthiness certificates: Instrument and equipment requirements.

(a) *General.* Except as provided in paragraphs (c)(3) and (e) of this section, no person may operate a powered civil aircraft with a standard category U.S. airworthiness certificate in any operation described in paragraphs (b) through (f) of this section unless that aircraft contains the instruments and equipment specified in those paragraphs (or FAA-approved equivalents) for that type of operation, and those instruments and items of equipment are in operable condition.

[Subsections (b) through (f) make clear that a "[T]achometer for each engine" is a requirement for all types of operations.]

Section 91.9 [now recodified as § 91.13(a)] provided:

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3] Respondent denies the flight described in paragraph 3 was a passenger-carrying flight. We note that Mr. Stanley, the first mechanic respondent consulted, testified that respondent told him he intended to fly back to Baltimore with five passengers. (Tr. 31.) While respondent denies, in his brief, that he carried passengers on his flight to Baltimore, he did not present any testimony or other evidence to contradict Mr. Stanley's testimony on this point. However, even assuming the Administrator did not prove this element of the allegation, in our view this would not render respondent's violations any less serious.

commencing those flights that his tachometer was inoperative. He also acknowledges that the FAA placed a condition notice in his aircraft prior to the flights at issue, and that the notice identified "tachometer cable broken" as one of two conditions (the other being a malfunctioning aileron cable) requiring correction prior to any flight.[4] (Exhibit A-2.) However, he has maintained throughout this proceeding that he should be found blameless, primarily because he justifiably relied on an aircraft mechanic (Paul Desrosiers) who told him, after fixing the related aileron problem, that the aircraft was airworthy, and safe to fly.[5]

Respondent claims that he was unaware, at that time of these flights, that a Federal Aviation Regulation (FAR) specifically prohibits operation of an aircraft which does not contain certain instruments and equipment, including an operable tachometer. (14 C.F.R. 91.33 [now 91.205].) He also argues that "airworthiness" is a vague term, and that he had no way of knowing that it

[4] FAA inspectors were summoned to respondent's aircraft on Saturday, June 16, 1990, by Edmund Stanley, who respondent had initially contacted after he had been informed that Mr. Stanley was the only certificated aircraft mechanic on the island of Martha's Vineyard. Mr. Stanley indicated to the FAA that his concern was based on respondent's apparent intention to return to Baltimore the following day, with passengers -- even after being informed by Mr. Stanley that the tachometer cable could not be fixed that weekend and the aircraft would be unairworthy without an operational tachometer.

[5] Mr. Desrosiers testified that he did indeed tell respondent that the aircraft was safe to fly. However, he stated that he did not remember whether he told him the aircraft was airworthy, although Mr. Desrosiers' testimony at the hearing indicated that, in his opinion, it was airworthy. (Tr. 74, 86.)

embraces the aircraft's conformity with its type design as well as its condition for safe flight.[6]

To prove a violation of section 91.29(a) [now 91.7(a)], the Administrator must show that the airman operated an aircraft that he knew or reasonably should have known was not airworthy.[7] The fact that the FARs specifically require that an aircraft must have an operational tachometer in order to be lawfully flown,[8] standing alone, is enough to establish that respondent should have known that his aircraft was unairworthy because of the inoperable tachometer.[9]

Nevertheless, it is apparent from the record that respondent also had actual notice of the unairworthy and unsafe condition of his aircraft. He was informed by Mr. Stanley that, even if he could fix the aileron problem, respondent's aircraft would still

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[6] Before an aircraft may be considered airworthy, it "(1) must conform to its type certificate, if and as that certificate has been modified by supplemental type certificates and by Airworthiness Directives; and (2) must be in condition for safe operation." Administrator v. Nielsen, NTSB Order No. EA-3755 at 4 (1992), citing Administrator v. Doppes, 5 NTSB 50, 52 n. 6 (1985). We note that this definition is reflected in section 603(c) of the Federal Aviation Act (49 U.S.C. 1423(c)) and in section 21.183 of the FARs (14 C.F.R. 21.183), both setting forth criteria for the FAA's issuance of airworthiness certificates. Thus, we find respondent's vagueness argument without merit.

[7] Administrator v. Parker, 3 NTSB 2997 (1980); Administrator v. Gasper, NTSB Order No. EA-3242 (1991).

[8] 14 C.F.R. 91.33(a) [now 91.205(a)]. See also 14 C.F.R. Part 23, setting forth airworthiness standards for the issuance of type certificates, specifically section 23.1305, which requires a tachometer for each engine.

[9] It is axiomatic that an airman is charged with knowledge of the FARs.

be unairworthy because of the inoperative tachometer.[10] (Tr. 30, 41.) In addition, he was explicitly notified by the FAA, through a condition notice, that the broken tachometer cable was an imminent hazard to safety, and that operation of the aircraft prior to correction of this condition would be contrary to the FARs. (Exhibit A-2.) In view of respondent's actual and constructive knowledge that his aircraft was not airworthy, we hold that respondent could not reasonably rely on Mr. Desrosiers' alleged representation to the contrary.[11]

The Administrator presented expert testimony pertaining to the safety reasons for requiring an operational tachometer.[12] Indeed, the condition notice indicated that the broken tachometer cable (along with the malfunctioning aileron) constituted "an imminent hazard to safety." Although counsel for the

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[10] Although respondent disputes that Mr. Stanley told him this, the law judge, after recognizing respondent's disagreement, made an explicit credibility finding in favor of Mr Stanley's testimony on this point. (Tr. 175.) We see no reason to overturn this credibility finding. See Administrator v. Wilson, NTSB Order No. EA-4013 at 4-5 (1993).

[11] The law judge noted, and we concur, that Mr. Desrosiers' testimony indicates that he does not appear to understand the difference between the two elements of airworthiness (flyability and conformance with type design). (See, e.g. , Tr. 86-8, 93, 95.) We are also alarmed that Mr. Desrosiers -- an FAA-certificated mechanic -- apparently considered it both lawful and safe for respondent to fly an aircraft with an inoperable tachometer.

[12] The tachometer, the only instrument which gauges the engine revolutions per minute (RPMs), is used to check the engine's performance status in a variety of situations. (Tr. 57.) Without an operational tachometer, a pilot could not be certain whether, for example, the engine had reached its full takeoff power, or whether it was exceeding its operating limitations. (Tr. 67, 114.)

Administrator stated, in closing argument, that the FAA's position in this case is based only on the first prong of the airworthiness test (that respondent's aircraft did not conform to its type certificate (Tr. 159)), the evidence supports his argument on appeal that the inoperable tachometer created an unsafe condition which potentially endangered respondent and others (App. Br. at 16-7). We agree with the Administrator's position on appeal, and hold that respondent's aircraft failed to meet either prong of the airworthiness test, i.e., it neither conformed to its type design, nor was in a condition for safe operation.

Accordingly, it is clear that respondent violated sections 91.29(a) [now 91.7(a)] (operation of an unairworthy aircraft), 91.33(a) [now 91.205(a)] (operation of an aircraft without an operable tachometer) and 91.9 [now 91.13(a)] (careless or reckless operation of an aircraft so as to endanger persons or property).[13]

Respondent raises several additional arguments which merit little discussion. We reject respondent's contention that 14 C.F.R. 91.3(b), which permits a pilot to deviate from the FARs to the extent required to meet an in-flight emergency requiring

[13] In view of the safety hazards implicit in operating without an operable tachometer, we think an independent, as opposed to a residual, violation of section 91.9 has been established. Contrary to respondent's assertion that no persons or property were endangered, his operations potentially endangered his passenger on the first flight (Mr. Desrosiers), as well as other persons or property he might have encountered in the air or on the surface in the event of a mishap.

immediate action, is applicable to the circumstances of this case. Respondent asserts that the three flights here at issue -- two of which were related to returning mechanic Desrosiers to his facility and the third which involved flying the aircraft back to Baltimore -- were all "part and parcel of his efforts to correct the original emergency conditions," i.e., the aileron and tachometer malfunctions which arose during his flight to Martha's Vineyard on Friday, June 15. (App. Br. at 17-9.) However, as we said in Administrator v. Chritton, 5 NTSB 2444, 2447 (1987), aff'd, Chritton v. NTSB, 888 F2d 854 (D.C. Cir. 1989),

> [t]he kind of emergency to which Section 91.3(b) refers is an inflight emergency that requires immediate action. Moreover, the temporary suspension of the effectivity of the operating rules of FAR Part 91, for the duration of the emergency itself, is not intended to extend to an entire flight operation but only to an unforeseeable condition that arises after takeoff.

Respondent also contends that the FAA inspectors' and Mr. Stanley's entry into his aircraft, in connection with the FAA's inspection and issuance of the condition notice, violated the Fourth Amendment of the Constitution and also constituted a criminal trespass, because respondent had not consented to the entry. We note, however, that section 609 of the Federal Aviation Act (49 U.S.C. 1429), which is cited on the condition notice itself, authorizes the Administrator to reinspect aircraft "from time to time," without any requirement for consent, a warrant, or even probable cause. However, assuming the Fourth Amendment applies to this situation, we think it unlikely that any violation occurred. Not only did Mr. Stanley, who opened

respondent's aircraft to the inspectors for inspection, indicate that he had respondent's permission to enter and work on the aircraft (Tr. 54, 61, 126), but he had provided the inspectors with sufficient information based on his own earlier inspection of the aircraft to give the inspectors probable cause to believe the aircraft was unairworthy and would constitute a hazard to safety if flown.[14]

Respondent's procedural arguments are similarly unavailing. Regarding the place of the hearing, the law judge was required by our rules to give "due regard . . . to the convenience of the parties." (49 C.F.R 821.37(a).) All of the Administrator's witnesses, including all of the percipient witnesses (except respondent), and counsel for the Administrator were located near Boston. The law judge's decision to set venue in Boston, as opposed to Washington, D.C., as respondent requested, did not constitute an abuse of discretion. See Administrator v. Berko, 6 NTSB 1334 (1989). Nor can we agree with respondent that the law judge impermissibly "controlled" his testimony. Respondent's position was made clear both in his pre-trial filings and at the hearing, in argument and testimony. The law judge's pointed questioning of respondent merely indicated her disagreement with respondent's untenable position.

[14] In any event, we would reach the same result even if we excluded the results of that challenged entry (issuance of the condition notice) from our consideration of this case. We would have no difficulty concluding that respondent knew or should have known that his aircraft was unairworthy, even absent the condition notice.

Finally, respondent asserts that the regulations which he was charged with violating were not properly identified, in that the complaint cited Part 91 section numbers which, although valid at the time of the flights here at issue, had been renumbered by the time the order was issued on July 16, 1991. However, the complaint provided respondent with adequate notice of the content of the pertinent regulations. Moreover, we note that the FAR volume containing Part 91 contains a redesignation table which clearly correlates the old section numbers with the new ones.

In sum, we uphold the law judges's initial decision in this case. We agree that, in view of the deliberate nature of respondent's offense, and fact that there were three separate flights, a 120-day suspension of respondent's pilot certificate is justified.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is affirmed; and

3. The 120-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.[15]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[15] For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).